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April 5, 1995

Mr. William Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Dear Mr. Caton:

On behalf of Southeast Telephone, L.P., enclosed for filing are an original and nine copies of Reply Comments pertaining to the Emergency Petition for Waiver filed by Telephone Electronics Corporation. We have also enclosed a file copy which should be stamped and returned.

Should you have any questions regarding this filing, please contact the undersigned.

Very truly yours,



Richard S. Myers

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Section 309(j)) PP Docket No. 93-253
of the Communications Act -) DOCKET FILE COPY ORIGINAL
Competitive Bidding)
)
(TEC Waiver Request))

REPLY COMMENTS OF SOUTHEAST TELEPHONE, L.P.

Southeast Telephone, L.P. ("Southeast Telephone"), by its attorneys, hereby files reply comments with respect to the "Emergency Petition for Waiver" [hereinafter "Petition"] filed by Telephone Electronics Corporation ("TEC") on March 28, 1995. Southeast Telephone filed opposition comments on April 3, 1995 under the expedited comment period established by the Federal Communications Commission ("Commission").

After reviewing the comments associated with the Petition, Southeast Telephone continues to adamantly oppose the grant of TEC's Petition. Southeast Telephone will take this opportunity to summarize what it believes are the strongest arguments in opposition to the grant of TEC's Petition.

I. THE COMMISSION SHOULD RESOLVE THE ISSUES RAISED IN TEC'S APPEAL

The timing and expedited comment period of TEC's Petition strongly indicate that this whole process is a result of settlement discussions between the Commission and TEC. Clearly, the Commission's motivation is to remove the cloud over its designated entity preferences and to start the C Block auction as soon as possible. However, as Omnipoint

Communications, Inc. ("Omnipoint") and Press Broadcasting Company, Inc. ("Press") argued, simply disposing of the TEC appeal will in no way remove the cloud over the designated entity preferences. There almost certainly are other parties who would be willing to step into TEC's shoes by appealing the constitutionality of the designated entity provisions. Even if the challenge does not occur before the C Block auction, the Supreme Court's upcoming decision in Adarand Constructors, Inc. v. Pena will also impact the constitutionality of the Commission's rules. Finally, the Commission's decision to settle the TEC matter without substantively addressing the arguments raised could delay the ultimate grant of licenses should a party raise the constitutional arguments after the C Block auction.

As Omnipoint argued, the overriding goal in this docket at this point should be certainty. Settling the TEC matter by granting the Petition only creates more uncertainty because it sets Commission precedent for every disgruntled potential auction participant to file waiver requests with the Commission. Settling the TEC matter also ignores the reality that the constitutionality of the preferences will be addressed at some point, and for purposes of certainty, the sooner those issues are addressed, the sooner there will be certainty as to how the Commission will perform the C and F Block auctions.

II. THE COMMENTS DO NOT SUPPORT THE MERITS OF TEC'S PETITION

While the Commission will undoubtedly state that the vast majority of commenters support TEC's Petition, the truth is that very few of the commenters examined the Petition's underlying merits. In most cases, commenters took the short sighted view that any action leading to dismissal of the TEC appeal would bring the C Block auction closer to reality. Proceeding on this assumption, the commenters essentially held their noses and voiced support for TEC. The only parties supporting TEC's Petition that examined its merits were similarly situated rural telephone companies that quite clearly hoped to benefit from a grant. Clearly, the comments provide no basis upon which the Commission may argue that the standards established in its rules for grant of waiver requests have been met.

III. TEC FAILED TO DEMONSTRATE THAT THERE IS NO REASONABLE ALTERNATIVE TO THE GRANT OF ITS WAIVER

Section 24.819(a)(1)(ii) of the Commission's rules requires that an applicant for waiver show the lack of a reasonable alternative. Assuming that the purpose of TEC's Petition is to have access to 30 MHz of PCS spectrum, Southeast Telephone contends that there are at least two reasonable alternatives to granting TEC's Petition. First, the Commission's rules expressly provide for partitioning of PCS licenses to rural telephone companies.¹ TEC could

¹ 47 C.F.R. § 24.714(a).

certainly approach the A or B Block winners to discuss partitioning portions of their Major Trading Areas so that TEC could expedite service to its rural customers. Second, as The Richard L. Vega Group argued, TEC could have altered its structure to ensure that it satisfied the Commission's eligibility rules. Similar to Pacific Telesis, TEC could have separated its rural telephone companies from its long distance company. By doing this, as TEC's Petition demonstrates, TEC would have easily fit under the Commission's gross revenue rule. For these two reasons, Southeast Telephone argues that TEC's Petition has not satisfied the requirements of Section 24.819(a)(1)(ii) of the Commission's rules.

IV. PROCEDURAL ISSUES PREVENT A GRANT OF TEC'S WAIVER

Southeast Telephone reiterates its position that the Commission does not currently have jurisdiction over this matter while TEC's appeal is pending. Before even accepting TEC's Petition for filing, the Commission should have required TEC to dismiss its pending appeal. Clearly, TEC would not take this action, because it would lose all its leverage over the Commission.

Second, Southeast Telephone concurs with the argument made by the Association of Independent Designated Entities: Under the Administrative Procedure Act ("APA"), grant of TEC's Petition would constitute a rulemaking in disguise. As the comments indicate, there are a group of rural telephone companies that are not satisfied with the Commission's rules.

TEC participated in the Commission's rulemaking establishing its eligibility criteria. TEC and the other rural telephone companies now seek to accomplish through the threat of delay what they could not accomplish through the rulemaking. Granting a waiver based on arguments that were rejected in the rulemaking will certainly constitute arbitrary and capricious behavior and opens the Commission to the charge that it is modifying its rules through the waiver process in lieu of initiating a time consuming rulemaking.

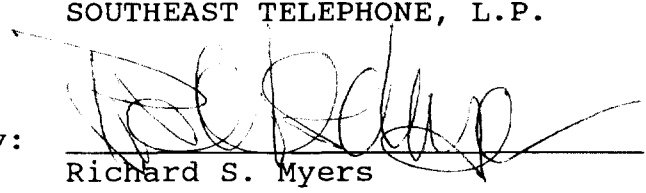
V. CONCLUSION

Based on the foregoing, the Commission should abandon its attempt to have the stay lifted by engaging in an ad hoc rulemaking violating the APA. Such a quick fix will not achieve the desired result. Despite the feeling that the Commission's so-called settlement with TEC is a "fait accompli", Southeast Telephone urges the Commission to reconsider and deny TEC's Petition.

Respectfully submitted,

SOUTHEAST TELEPHONE, L.P.

By:




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April 5, 1995

CERTIFICATE OF SERVICE

I, Nichelle Rudd, an employee in the Myers Keller Communications Law Group, do hereby certify that on this 3rd day of April, 1995, I mailed a copy of the foregoing "Reply Comments of Southeast Telephone, L.P." by first class mail, postage prepaid, to the names and addresses shown on the attached list.



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